

ARTICLE APPEARED  
ON PAGE A 6WASHINGTON POST  
4 November 1984

# Jurors in CBS Libel Suit View Show in Segments

*Lawyer Said to Find It Too Convincing*

By Eleanor Randolph  
Washington Post Staff Writer

For three weeks, jurors in retired Army Gen. William C. Westmoreland's libel suit against CBS have heard testimony about a CBS documentary that aired almost three years ago.

But so far none has seen the entire show.

Westmoreland's attorney, Dan M. Burt, has been parceling out segments in what he describes as "acts," so far he has let the jury see three of five segments of "The Uncounted Enemy: A Vietnam Deception" that is the subject of the historic trial.

Part of the reason, according to lawyers familiar with the case, is that Burt thinks the 90-minute program appears too convincing when shown in one burst. By the time the 12 jurors see the entire documentary, he wants them to be educated about Westmoreland's view of the charges made against him in the program.

The CBS show charged that there was a conspiracy at the highest levels of the military command in Vietnam to suppress and alter enemy strength figures in the crucial period before the Tet offensive, which began in January 1968.

Westmoreland, who filed his \$120 million lawsuit against the network two years ago, said he was the victim of "Star Chamber" interviewing by CBS' Mike Wallace, a co-defendant, and called the broadcast a "preposterous hoax."

Burt has told reporters that when he saw the show for the first time his reaction was, "My God, he did it." He called it expressionistic art, saying the show was to Vietnam what George C. Scott was to Patton.

CBS lawyer David Boies asked jurors more than three weeks ago whether they were good at numbers, and the reason has become readily apparent.

This case is a rehashing of what was called "the numbers game" by some intelligence analysts in Vietnam 17 years ago. As Westmoreland lays the groundwork for his libel case, his lawyers have tried to prove that the CBS program was false when it accused him of forcing an arbitrary ceiling of 300,000 on enemy estimates for fear that the public and President Lyndon B. Johnson would not accept a higher figure.

At issue is a 1967 conflict between the top officers of Westmoreland's Military Assistance Command, Vietnam (MACV) and some

CIA analysts over whether about 120,000 members of home guard units that laid booby traps and punji sticks should be included in the official estimate of enemy strength.

Westmoreland's witnesses each have tried to make the point that the conflict between MACV and the CIA was a "debate" rather than a "conspiracy" as CBS has charged. And the witness who perhaps said it most clearly was retired lieutenant general Daniel O. Graham, who was on the stand last week.

Graham, whose down-to-earth way of speaking broke through the maze of numbers and military acronyms that have dominated much of the testimony, said some estimates that are expected to be pushed by future CBS witnesses exhibited "mock certainty."

"You would see a figure like a total in Vietnam of 246,113 people, or something like that, as if we knew there weren't 246,112 or 246,114, and that was preposterous," he said.

Graham explained a system he instituted in Vietnam as head of MACV's current intelligence branch: "What I tried to find was a system that made use of information we did have instead of this business of trying to count all these people, which was very much like trying to count cockroaches in a dark barn with a flashlight."

*Continued*

If there is a battle between the military and the press in this trial, there is also a fascinating legal fight going on between the two lawyers in the courtroom—Burt for Westmoreland and Boies for CBS.

Burt, who runs Capital Legal Foundation, a conservative public interest law firm in Washington, paces the courtroom, a perpetually stern look on his face.

By contrast, Boies, a former aide to Sen. Edward M. Kennedy (D-Mass.) and now a partner in the prestigious Wall Street law firm of Cravath, Swaine & Moore, smiles often as he woos the jury and even makes self-deprecating jokes during the proceedings.

But for all the smiles, Boies can be so tough in his grilling of witnesses that reporters covering the trial have begun to hum the theme from "Jaws" quietly as he stands up to cross-examine Westmoreland's former colleagues and supporters.

Moreover, in the mini-summations that the judge has allowed each side to give throughout this complicated trial, Boies wastes no words. Nor does he mince them.

Early last week, after Burt reminded the jury of the prominent military and government men who already had appeared for Westmoreland, Burt said the key question is, "Did [Westmoreland] lie to his superiors? . . . Did he violate his oath of duty?"

Boies stood instantly and declared: "I think the answer to Mr. Burt's question of 'Did Westmoreland lie to his superiors?' is yes." Then Boies said that when his turn came to present the CBS side of the case "you will get from that an indication of how much there was suppression and lying, if that's the word Mr. Burt wants to use, yes, lying to Westmoreland's superiors."

When he sat down, the courtroom was hushed as the audience of lawyers, journalists and Vietnam buffs was reminded again that this war of words between Burt and Boies is an unconventional one.